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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 51

EDDIE J. HICKS,

Petitioner,

vs.

DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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In less than four and one-half folio pages, respondent (the District of Columbia) has apparently exhausted its defense of the constitutionality of Subsection 3—the District of Columbia vagrancy statute which is the subject of this proceeding.* The balance of its argument attempts to show, despite the unqualified granting of certiorari by the Court (379 U.S. 998),** that this scant defense of Sub-

* See Brief for Respondent 20-25.

** When this Court wishes to hear argument on jurisdictional or procedural matters not presented in the petition for certiorari (or in the jurisdictional statement in the instance of an appeal), the practice is to direct specifically that such matters be considered in briefing and arguing. See, *e.g.*, *Konigsberg* v. *State Bar*, 351 U.S. 936 (1956) (certiorari); *Cramp* v. *Board of Pub. Instruction*, 368 U.S. 278 (1961) (appeal). Absent such direction—and when, as here, such matters have been fully aired in the petitioning papers—it can be assumed that the Court does not consider such issues of substantial importance. Since respondent persists in these objections, and since they are in any event matters which are always open, a reply is required.

section 3's constitutionality should not be considered. Since these matters were only mentioned without elaborate discussion in the Brief for Petitioner, a reply is necessary in order that it might not be thought that any procedural vices have, on this occasion, insulated Subsection 3 from scrutiny.

Briefly stated, the issues raised by respondent are three: (1) Does the Supreme Court have the *power* to entertain a petition for certiorari to a United States Court of Appeals in a criminal case when the petition was filed more than 30 days after the rendition of judgment in the Court of Appeals? (2) Does the Supreme Court have the *power* to entertain by writ of certiorari a case involving an unconstitutional statute in which the United States Court of Appeals for the District of Columbia Circuit has denied a petition for allowance of an appeal from the District of Columbia Court of Appeals? (3) Finally, should the Supreme Court review the constitutionality of a statute in a criminal case where the evidence upon which the conviction was obtained was not recorded and thus is not part of the trial or appeal records? These objections will be answered seriatim.

I. Rule 22(2) of This Court, Which Alone Governs the Timeliness of the Petition for Certiorari, Is Not Jurisdictional or Mandatory and May Be Waived by This Court.

The opening brief for petitioner asserted in the Jurisdictional Statement (Brf. for Pet., p. 2) the appropriate dates and orders below and concluded that the filing of the petition for certiorari was timely. As authority, petitioner relied exclusively upon *Heflin* v. *United States*, 358 U.S.

415 (1959). In answer, respondent has discussed and cited cases which are wholly irrelevant to the effect of Rule 22(2). It has *not* cited or discussed *Heflin*. Some of the cases relied upon by respondent have involved statutory time limitations which, of course, are ordinarily jurisdictional and mandatory. Such was the situation in *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) (cited and relied upon in Brief for Respondent, pp. 9-10); and *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Other cases cited by respondent involved the power of *lower* courts to depart from time limitations set by the Supreme Court through the rule-making process. In most instances, these rules are similarly held to be jurisdictional and mandatory for the lower courts. See, *e.g.*, *United States* v. *Robinson*, 361 U.S. 220 (1960) (cited and relied upon in Brief for Respondent, pp. 11-12).

Unlike the situations involved in the cases relied upon by respondent, the *only* provision governing the time within which a petition for certiorari to a United States Court of Appeals in a criminal case must be filed is Rule 22(2) of the Rules of this Court:

"Rule 22. Review on certiorari—time for petitioning

. . . . . .

(2). A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within thirty days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days. . . ."

This rule is not dictated by any statute. Section 2101 of 28 U.S.C. which specifies certain time limitations in other types of cases is silent on the matter of petitions for certiorari in criminal cases from the Courts of Appeals. The rule itself apparently has been promulgated under the general power of the Supreme Court under 28 U.S.C. § 2071 to make rules for the conduct of its business. So in *Heflin* v. *United States,* 358 U.S. 415 (1959), when this Court was presented with the question of the applicability of Rule 22(2) to a petition for certiorari to a court of appeals in a criminal case which was not filed until more than 30 days from the date of the judgment below, the Court held that the requirement of Rule 22(2) could be dispensed with "because no jurisdictional statute is involved . . ." (358 U.S. at 418 n. 7).

It was, therefore, within the discretion of the Supreme Court to grant the petition for certiorari filed in this case. Respondent has not intimated that this discretion has not been soundly exercised in this case. Indeed, the Court of Appeals through its order of October 26, 1964 (R. 33), which vacated and reentered as of that date its order of June 15, 1964 (R. 28), necessarily found that the failure of petitioner to seek review within 30 days of June 15, 1964, was caused by the excusable neglect of his attorney. That finding is, of course, not binding upon this Court. But coupled with this Court's unqualified granting of petitioner's writ on February 5, 1964 (R. 36; 379 U.S. 998) and the obvious importance and substantiality of the question presented, it should have been apparent to respondent that the requirement of Rule 22(2) had, in the exercise of this Court's power over the conduct of its own business, been dispensed with.

II. This Court Has the Power to Entertain This Case on a Writ of Certiorari.

The remaining question relating to the jurisdiction of the Court is whether an act of Congress empowers the Court to review by writ of certiorari the judgment of the United States Court of Appeals from the District of Columbia Circuit. Such jurisdiction does exist by force of 28 U.S.C. § 1651(a) which empowers this Court to issue a common-law writ of certiorari.*

It should first be shown why 28 U.S.C. § 1254(1)—the generally applicable provision permitting review on writ of certiorari of cases in the courts of appeals—is not applicable here. Section 1254(1) provides as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ."

Reading the statute by itself, there is no apparent reason why it should not be applicable to the present case. The last procedural step required of petitioner by the statute before he could come to the Supreme Court was accomplished when, "in the court of appeals," his petition for allowance of an appeal was denied. His case is, of course,

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* The petitioner's petition for certiorari invoked jurisdiction alternatively, under 28 U.S.C. § 1254(1) or § 1651(a), (so-called common-law certiorari). These are discussed briefly in Brief for Petitioner 1-2. Because of the alternative invocation of jurisdiction, the Rule of this Court (Rule 31(1), (2) and (4)) governing applications for common-law certiorari was not specifically applicable. The showing required by Rule 31 is, however, apparent from the jurisdictional facts presented in the petition for certiorari.

a "civil or criminal case." And the necessary petition for writ of certiorari has been filed and granted.

The only possible impediment to the automatic application of Section 1254(1) is the memorandum order of the Supreme Court entered in 1926 in the case of *Ferguson* v. *District of Columbia*, 270 U.S. 633. The facts in the case have been obtained from the recital given in the Petition for Writ of Certiorari (October Term, 1925; No. 997). The District of Columbia did not file an opposition. Mrs. Ferguson was arrested while picketing a retail store in Washington, D.C., on behalf of two labor organizations. She was charged with violating a police regulation then in force in the District* which, in effect, prohibited picketing by members of organized labor in front of any retail store. Mrs. Ferguson contended that the police regulation was void because it conflicted with Section 20 of the Clayton Act which legalized such picketing and which further specifically stated that such picketing was not to be held to constitute a violation "of any law of the United States." (Clayton Act, § 20, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958).) Following conviction in the District of Columbia Police Court, Mrs. Ferguson petitioned a justice of the Court of Appeals for the District of Columbia for a writ of error to review the conviction. That justice denied the petition and Mrs. Ferguson petitioned the Supreme Court for a writ of certiorari.

Several months after the petition for certiorari was filed, the Supreme Court denied it "for want of jurisdiction in this court under § 240 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1(a), 43 Stat.

* The present District of Columbia statutes and police regulations contain no similar provision.

938. . . ." *Ferguson* v. *District of Columbia, supra,* Section 240 of the then Judicial Code which was the jurisdictional statute construed in *Ferguson* v. *District of Columbia, supra,* provided that the Supreme Court could issue certiorari for the purposes of review "in any case, civil or criminal, in a circuit court of appeals, or *in* the Court of Appeals of the District of Columbia. . . ." (Emphasis supplied.) While the memorandum opinion gives no reasons, it has been interpreted as holding that a case as to which the Court of Appeals has denied an appeal without a hearing on the merits is not a case "in" the Court of Appeals. See *House* v. *Mayo,* 324 U.S. 42, 44 (1945):

> "This Court cannot issue a writ of certiorari in the present case under §240(a) of the Judicial Code, 28 U.S.C. §347(a). *Ferguson* v. *District of Columbia,* 270 U.S. 633. Our authority under that Section extends only to cases 'in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia.' Here the case was never 'in' the court of appeals, for want of a certificate of probable cause."

Were it not for the relative age of the *Ferguson* case, its seeming reaffirmation in *House* v. *Mayo, supra,* and the fact that the statute construed was carried over substantially unmodified in the Judicial Code of 1948 (in 28 U.S.C. § 1254(1)), logic would seem to compel its overruling. But no such drastic exercise of judicial power is necessary. The soundness of the *Ferguson* case need not be considered since ample authority for the exercise of certiorari jurisdiction in the present case exists under the "all writs" section of the Judicial Code, 28 U.S.C. § 1651(a). This section provides that:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

On a number of occasions, as respondent concedes (Brief for Respondent, pp. 14-15), Section 1651(a) or its predecessor statutes have been employed as the jurisdictional basis for the exercise of appellate review by the Supreme Court. On each of these occasions, as in this one, no other statute permitted such review; in fact, the only other applicable statute seemed to have precluded review on writ of certiorari or by any other specific method. See, *e.g.*, *House* v. *Mayo*, 324 U.S. 42 (1945) (28 U.S.C. § 1254(1) held unavailable); *United States Alkali Exports Ass'n* v. *United States*, 325 U.S. 196 (1945) (§ 2 of Expediting Act of 1903, as amended 15 U.S.C. § 29 (1958), permitted review of interlocutory orders only after final judgment in district court). The all writs section cannot, of course, be used in defiance of a specific jurisdictional statute so as drastically to enlarge or expand the jurisdiction of the federal courts. *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 203 (1945); *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383 (1953). And, as pointed out in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943):

> "The traditional use of the writ in aid of appellate jurisdiction both at common-law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. . . ."

The function of the writ is not to correct merely erroneous rulings of law which do not violate the lower court's jurisdictional limitations. *Roche* v. *Evaporated Milk Ass'n, supra* at 27; *Bankers Life & Cas. Co.* v. *Holland, supra* at 382. Especially is this true where the ruling complained of can be reviewed by direct appeal after final judgment at a later stage of the call.

These limitations are, however, inapplicable to the present case. In the first place, if petitioner cannot obtain a hearing in the present case in this Court, he is effectively and finally precluded from attacking in federal court the constitutionality of his conviction. The record in this case speaks eloquently to the point that review in the Court of Appeals is precluded when it is sought from a judgment of the local and inferior Court of Appeals for the District of Columbia. Since the trial court's judgment was "imposition of sentence suspended" (R. 4), petitioner is not in custody and habeas corpus or relief under 28 U.S.C. § 2255 is not available in any federal court. See 28 U.S.C. § 2241 (c); *McNally* v. *Hill*, 293 U.S. 131, 137 (1934). Finally, review by the United States District Court for the District of Columbia (which alone could provide an appeal and hearing as of right in the Court of Appeals)* on a writ of error *coram nobis* is not available since that court is not competent to review judgments entered by the District of Columbia Court of General Sessions. See *United States* v. *Morgan*, 346 U.S. 502, 505 n.4 (1954); *United States* v. *Smith*, 331 U.S. 469, 475 n.4 (1947). Hence, petitioner's final and only opportunity for appellate or other review is the present proceeding. The action of the Court of Ap-

* See 28 U.S.C. § 1291.

peals—if respondent's assertions are accepted—would mean that this Court would be effectively prevented from reviewing a constitutional question whose importance and substantiality is patent.

Secondly, if the Court of Appeals had exercised the power it undoubtedly has under D.C. CODE § 11-741 (Supp. IV, 1965) to review this case when the opportunity was presented to it, then this Court would clearly have been empowered by 28 U.S.C. § 1254(1) to review its decision on the merits. This Court would, therefore, have jurisdiction under 28 U.S.C. § 1254(1) if the Court of Appeals had exercised that power. Should its refusal to do so take from this Court power which it otherwise would have? Clearly not, and it is precisely in cases such as this that the all writs section has previously been employed to bring an unreviewed case before it. Such a case was *House* v. *Mayo*, 324 U.S. 42 (1945).

In the *House* case, the petitioner had been denied a certificate of probable cause by both the district court and the court of appeals under the predecessor to 28 U.S.C. § 2253 in his efforts to seek review of the district court's denial of his petition for habeas corpus. He then sought review in the Supreme Court under the all writs section. This Court held that the all writs section *did* provide the necessary statutory foundation for the exercise of its appellate jurisdiction, stating that

> "by virtue of that Section we may grant a writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it. *In re 620 Church St. Corp.*, 299 U.S. 24, 26, and cases cited; *Holiday* v. *Johnston*, 313 U.S. 342, 348, n.2; *Wells* v. *United States*,

> 318 U.S. 257; *Steffler* v. *United States*, 319 U.S. 38. And not only does our review extend to a determination of whether the circuit court of appeals abused its discretion in refusing to allow the appeal, but if so, it extends also to questions on the merits sought to be raised by the appeal. See *Holiday* v. *Johnston, supra; Steffler* v. *United States, supra*. . . ." (324 U.S. at 44-45.)

The Court examined the petitioner's constitutional objections to his continued confinement and found that a violation of constitutional rights was presented in the petition for habeas corpus. It then examined the decision of the district court denying the petition, found several errors in it, and concluded that:

> "The decision of the district court is thus not supported by the grounds assigned for it, and should have been reversed by the court of appeals. And the judges of that court erred in not considering whether the case was an appropriate one for a certificate of probable cause, as they were authorized to do by 28 U.S.C. § 466 [now 28 U.S.C. § 2253]. We think they also erred in not issuing the certificate." (324 U.S. at 48.)

The only ground upon which respondent has attempted to distinguish *House* v. *Mayo, supra,* is the fact that the court of appeals in that case had not considered whether the case was one requiring it to make a certificate of probable cause. See Brief for Respondent, p. 15, citing *House* v. *Mayo, supra* at 44. But it is clear from 28 U.S.C. § 2253 and from the *House* case itself that the error of the court of appeals which the Supreme Court saw as requiring reversal was not so much that they had failed to consider whether it should

issue a certificate of probable cause but, more importantly, "that they also erred in not issuing the certificate." (324 U.S. at 48.) This latter error could only have arisen because of the obvious merits of the petitioner's constitutional contentions; if those contentions were without obvious merit, there would have been no reason to issue the certificate.

So in the present case, it is not denied that the court of appeals had some measure of discretion under D.C. CODE § 11-741 (Supp. IV, 1965) in determining whether to grant petitioner's petition for allowance of an appeal—just as it has discretion under 28 U.S.C. § 2253 in determining whether to issue a certificate of probable cause. But here, as in *House* v. *Mayo, supra,* the court of appeals refused to exercise that discretion even when the merits of the constitutional question presented were patent. Here, as in *House* v. *Mayo,* that refusal was erroneous and can be reversed by this Court by means of a writ of certiorari issued under the all writs section.

The fact that the court of appeals had, under D.C. CODE § 11-741 (Supp. IV, 1965), some measure of discretion in deciding whether to grant petitioner's petition for allowance of an appeal when it was before that court does not mean that their denial of a hearing is non-reviewable. Discretion does not mean absolute license. The Supreme Court in the exercise of its powers of supervision over the administration of criminal justice in the federal courts, *McNabb* v. *United States,* 318 U.S. 332 (1943), and in the exercise of its sound discretion under the all writs section, *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196, 202 (1945); *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21, 25 (1943) (and cases cited), unquestionably has the power to review such an exercise of discretion. That is the purpose of the present proceeding.

And when, as here, the seriousness and gravity of the constitutional question presented is apparent from the very face of the statute (Subsection 3) which is under attack, only the gravest considerations should suffice as reason for the court of appeals to deny the exercise of its discretionary jurisdiction. No grave consideration—no trifling consideration—existed in this case to justify the action of the court of appeals. The order of that court denying the petition for allowance of an appeal (R. 18-29, 33-34) is completely bereft of even an attempted justification. And the only reason which respondent has advanced to justify it (the absence of evidentiary facts) is completely without merit in the present case (see below). In such a posture, the action of the court of appeals was an abuse, not an exercise, of its discretion under D.C. CODE § 11-741 (Supp. IV, 1965). See *De Beers Consol. Mines* v. *United States*, 325 U.S. 212 (1945); *House* v. *Mayo*, 324 U.S. 42 (1945); *Holiday* v. *Johnston*, 313 U.S. 342 (1941); *In re 620 Church St. Bldg. Corp.*, 299 U.S. 24 (1936).

III. No Facts Necessary or Appropriate for Consideration of the Merits of This Case Are Absent From the Record.

Respondent contends that the Court of Appeals was justified in refusing to consider petitioner's appeal on its merits because the sole constitutional question presented was urged "on the basis of a record which is wholly unrevealing in factual terms. . . ."* This contention completely mis-

* Brief for Respondent, p. 17, quoting from the concurring memorandum of Judge McGowan in the order denying the petition for allowance of an appeal (R. 28-29, 34). Judge McGowan was writing here only for himself and not for any of the five other judges who voted to deny the petition. The extreme unlikelihood of preserving a fair and accurate factual record is commented upon in Brief for Petitioner, pp. 44-45.

understands the nature of petitioner's constitutional objections and disregards the well-settled distinction between an attack upon a statute "on its face" and one which attacks only the application of a statute. The present case involves only the former and while respondent's arguments might be valid as applied to the latter form of attack, they are irrelevant here.

Briefly stated, petitioner maintains that the vagrancy statute under which he was convicted—which defines a vagrant as one who is "leading an immoral or profligate life"—is on its face, void for vagueness regardless of what evidence may be adduced at trial to support an information under it.

It would be instructive at the beginning to set out what petitioner is not contending. First, he does not assert that the statute is constitutional as to him but would have unconstitutional application as against persons who are not parties to this case. See generally, Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962). Thus, the line of cases represented by *Raines* v. *United States,* 362 U.S. 17 (1960), is not relevant. Secondly, petitioner's attack on the statute has been made only after it was specifically applied to him. Decisions such as *Alabama St. Fed'n of Labor* v. *McAdory,* 325 U.S. 450 (1945) (attack on state statute before it was applied by state authorities) (cited in Brief for Respondent, p. 17), are, therefore, wholly inapposite. Finally, petitioner does not maintain that the District of Columbia's vagrancy statute is unconstitutional only in some instances and not in others. See *Yazoo & M.V. R.R.* v. *Jackson Vinegar Co.,* 226 U.S. 217 (1912); and see generally HART &

WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 176-92 (1953).

Petitioner does maintain that under *any* conceivable set of factual circumstances Subsection 3 is void for vagueness. Just such a case was presented in *United States* v. *Petrillo*, 332 U.S. 1 (1947), and the holding of the Court on the issue of the necessity for a factual record is directly applicable here:

> "One holding of the District Court was that, as contended here, the statute is repugnant to the due process clause of the Fifth Amendment because its words, number of employees needed by such licensee, are so vague, indefinite and uncertain that persons of ordinary intelligence cannot in advance tell whether a certain action or course of conduct would be within its prohibition . . . The information here, up to the place where it specifically charges the particular means used to coerce the licensee, substantially employs this statutory language. And the motion to dismiss on the ground of vagueness and indefiniteness squarely raises the question of whether the section invoked in the indictment is void *in toto*, barring all further actions under it, in this, and every other case. *Cf. United States* v. *Thompson*, 251 U.S. 407, 412. Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof. *Rescue Army* v. *Municipal Court, supra; Watson* v. *Buck*, 313 U.S. 387, 402. *Borden's Company* v. *Baldwin*, 293 U.S. 194, 204, 210, and concurring opinion at p. 213. But no refinement or clarification of issues which we can reasonably anticipate would bring into

> better focus the question of whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant. Consequently, since this phase of the appeal raises a question of validity of a statute within our jurisdiction under the Criminal Appeals Act, *supra,* and is ripe for our decision, we turn to the merits of the contention. . . ." (332 U.S. at 5-6.)

And so in the present case, no facts are necessary to determine whether the words "leading an immoral or profligate life" are unconstitutionally vague on their face. These words are so flagrantly amorphous that there could not possibly be here a narrowing construction if the application of the statute was doubtful. Compare *United States* v. *Raines,* 362 U.S. 17 (1960).

In addition, petitioner claims that the District of Columbia vagrancy statute has a potentially inhibiting effect on the exercise of the freedoms of expression (Brief for Petitioner, pp. 47-49). This potentially inhibiting effect is patent. And in such cases there is no requirement that there be facts of record showing that the person attacking the statute was engaged in constitutionally privileged activities. The reason for the lack of such a requirement has been well stated in *National Association for the Advancement of Colored People* v. *Button,* 371 U.S. 415, 432-33 (1963):

> "For standards of permissible statutory vagueness are strict in the area of free expression. See *Smith* v. *California,* 361 U.S. 147, 151; *Winters* v. *New York,* 333 U.S. 507, 509-510, 517-518; *Herndon* v. *Lowry,* 301 U.S. 242; *Stromberg* v. *California,* 283 U.S. 359; *United States* v. *C. I. O.,* 335 U.S. 106, 142 (Rutledge, J., con-

curring). Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98; *Winters* v. *New York, supra,* at 518-520. *Cf. Staub* v. *City of Baxley,* 355 U.S. 313. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. *Cf. Marcus* v. *Search Warrant,* 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *Cf. Smith* v. *California, supra,* at 151-154; *Speiser* v. *Randall,* 357 U.S. 513, 526. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell* v. *Connecticut,* 310 U.S. 296, 311."

It is clear, then, that the absence from the record of the evidentiary facts upon which petitioner was convicted is no impediment at all to a full and fair adjudication of the

constitutional question presented. The court of appeals did not give this (or any other reason) as a justification for its refusal to hear the case. But even if we assume with respondent that it *might* have, that justification is wholly unavailing. That refusal thus stands bereft of any possible justification or excuse; it stands forth not as an exercise of discretion but as an abdication of reasoned choice. It was erroneous and should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 51.—October Term, 1965.

Eddie J. Hicks, Petitioner, *v.* District of Columbia.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1966.]

Per Curiam.

The writ of certiorari is dismissed as improvidently granted.

SUPREME COURT OF THE UNITED STATES

No. 51.—October Term, 1965.

Eddie J. Hicks, Petitioner, v. District of Columbia. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February 28, 1966.]

Mr. Justice Harlan, concurring.

Among the several reasons which support the action of the Court in dismissing the writ in this case as improvidently granted, I rest my decision to join in this disposition on the lack of a record, without which I do not believe the constitutional issues tendered can properly be decided.

SUPREME COURT OF THE UNITED STATES

No. 51.—October Term, 1965.

Eddie J. Hicks, Petitioner, v. District of Columbia. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February 28, 1966.]

Mr. Justice Douglas, dissenting.

I.

We granted certiorari in this case to consider what I think is an important question: the constitutionality of petitioner's conviction of "vagrancy." Relying on our determination that this case presented substantial questions of constitutional law, the parties comprehensively briefed those questions and we heard argument. But now the Court decides that the case must be dismissed as improvidently granted.

With all respect, I must dissent from this disposition of the case.

In the first place, the alleged "untimeliness" of the petition was called to the attention of the Court by respondent in his brief opposing the grant of certiorari. We were thus fully aware of this point when we granted the writ. Moreover, Rule 22 (2) is not jurisdictional or mandatory and may be waived by this Court under proper circumstances, at least where no jurisdictional statute is involved. *Heflin* v. *United States*, 358 U. S. 415, 418 n. 7. Having brought the case here, required the parties to brief the issues, and heard argument, it is most inappropriate to decline to exercise our discretion and waive the time bar of Rule 22 (2).[1]

[1] The above assumes that Rule 22 (2) applies to this case. Our jurisdiction to review this decision is not based on 28 U. S. C. § 1254 (1) (1964 ed.) which we previously held did not permit review

Nor, in my opinion, is the objection to the adequacy of the record well founded. Petitioner argued in this Court that the statute defining "vagrant" is unconstitutionally vague. The challenged statute is § 22–3302 (3) of the District of Columbia Code, and it provides that a "vagrant" is:

> "Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source."

We do not need a detailed account of the particular facts of this case in order to pass on the claim that this statute lacks the specificity that due process of law requires. In *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, we said:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."

The Court held the challenged statute bad in that case without considering the defendant's conduct which formed the basis of the prosecution. If a penal statute is so imprecise as to deny fair warning to those who might transgress it, any conduct of the defendant prosecuted

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by writ of certiorari to cases where the Court of Appeals for the District of Columbia Circuit refused to allow an appeal. *Ferguson* v. *District of Columbia*, 270 U. S. 633. Our jurisdiction is founded on the power to issue a common-law writ of certiorari. *House* v. *Mayo*, 324 U. S. 42; 28 U. S. C. § 1651 (a) (1964 ed.). Arguably, Rule 22 (2) has no application in cases involving extraordinary writs. Rule 31 which governs the procedure on applications for extraordinary writs imposes no time limit.

under it which might have been proscribed by a more precisely worded statute is irrelevant.

The *Lanzetta* case is close kin to the present one because the crime there charged was one of being a "gangster" which was defined as any person "not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State." The Court, without considering the facts of record, looked only at the statute and the charge of the indictment and ruled that the Act was unconstitutional for vagueness.

If one takes my view and approaches this case as an attempt by the Government to regulate the *status* of being a vagrant, the absence of a detailed record is—as with the vagueness point—no impediment to proper analysis.

II.

Our vagrancy laws stem from the series of the Statutes of Labourers (23 Edw. 3; 25 Edw. 3, st. 1) first passed in 1349 and amended and modified from time to time over the next 200 years.[2] They reflected "the criminal aspect of the poor laws." [3] They "confined the labouring popu-

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[2] Stephen, History of the Criminal Law of England 203 *et seq.* (1883).

[3] *Id.*, at 266; see 2 Holdsworth, History of English Law, 459–462 (1927). The purpose of these statutes was to offset the loss of workers and to check the rise in wages which resulted from the Black Death. Those able to work, and lacking other means of support were compelled to work, and at regulated wages. Workers were confined to their existing place of residence. Stephen suggests that the "object of this legislation was to provide a kind of substitute for the system of villainage and serfdom which was then breaking down. . . ." Stephen, *op. cit. supra*, at 204. See also Kenny, Outlines of Criminal Law (Turner ed.) 411 (1958). Early laws forbidding begging distinguished between beggars "able to serve or

lation to stated places of abode, and required them to work at specified rates of wages. Wandering or vagrancy thus became a crime." [4] History tells the story from the point of view of the Establishment: that wandering bands of people, who had left their masters, committed all sorts of crimes and hence must be punished for wandering. That philosophy obtains in this country, because the English statutes provided the seed of our vagrancy laws. Article IV, § 1 of the Articles of Confederation assured the free inhabitants of each State, save "paupers, vagabonds, and fugitives from Justice," the privileges and immunities of citizenship of the several States, and the right of free ingress and egress to and from each State.

But there was incongruity in superimposing the English anti-migratory policy upon the law of America:

> "Vast movements of people motivated by urgent economic need settled this country from Europe, pushed settlement westward and fed growing cities from rural population reservoirs. England's Enclosure Acts, by withdrawing land from agricultural use, swelled the army of English vagrants; America invited migration with the lure of free land. The same elements of the population who on one side of the Atlantic were rogues and vagabonds, on the other were frontiersmen." [5]

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labor" and "beggars impotent to serve." See, *e. g.*, 12 Rich. 2, c. 7. Economic conditions changed; when work became scarce, laborers were forced to look elsewhere. The focus of the laws dealing with laborers shifted; the ban on migration became a preventive to keep a parish from being saddled with the needs of foreign paupers and idlers. "The vagrant came to be regarded rather as a probable criminal than as a runaway slave. He must be made to work or else be treated as a criminal." Stephen, *op. cit. supra*, at 274.

[4] Stephen, *op. cit. supra*, at 267.

[5] Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603, 617 (1956). And see Scott, Criminal Law in Colonial Virginia 272–275 (1930).

America's vagrancy laws were expanded to cover a host of acts other than wandering—begging, drunkenness, disorderly conduct, loitering, prostitution, lewdness, narcotics peddling, and so on. They were justified here, as in early England, as devices of control. This Court, writing in 1837, said:

> "We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease." *City of New York* v. *Miln,* 11 Pet. 102, 142–143.

The wanderer, the pauper, the unemployed—all were deemed to be potential criminals. As stated by the Court of Appeals for the District of Columbia in *District of Columbia* v. *Hunt,* 163 F. 2d, 833, 835, "A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life." The vagrant, therefore, is not necessarily one who has committed any crime but one who reflects "a present condition or status." *Handler* v. *Denver,* 102 Colo. 53, 58. Cf. *Ex parte Branch,* 234 Mo. 466, 470–471. That condition is not a failure to make a productive contribution to society, for the idle rich are not reached. The idle pauper is the target. Insofar as that status reflects pauperism it suggests the need for welfare; and insofar as it reflects idleness it suggests the need for the intervention of employment agencies. I do not see how under our constitutional system either of those elements can be made a crime. To do so serves the cause either of arrests and convictions on suspicion or of arrests and convictions of unpopular minorities (*Edelman* v. *California,* 344 U. S. 357, 366, dissenting opinion)—pro-

cedures very convenient to the police [6] but foreign to our system.

I do not see how economic or social status can be made a crime any more than being a drug addict can be. *Robinson* v. *California*, 370 U. S. 660, 668 (concurring opinion).[7] No overt act of criminal dimensions is charged here. Petitioner was either arrested on suspicion [8] or for innocent acts [9] which were used as a cloak for an arrest on grounds the police could not establish. In either event the arrest and conviction were, in my view, unconstitutional.

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[6] Foote, *op. cit. supra*, n. 5, at 625 *et seq.*

[7] The volume of vagrancy cases in the courts each year is large. The most recent FBI Crime Reports show that in 1964, in 3,012 cities with populations exceeding 2,500, 125,763 vagrancy arrests were made (out of a total of 4,155,924 arrests for that same period). Uniform Crime Reports—1964, p. 120.

[8] For the prevalency of arrests "on suspicion" or "for investigation" in the District of Columbia, see Report and Recommendations of the Commissioners' Committee On Police Arrests for Investigation (the Horsky Report), July, 1962.

[9] He was either arrested for playing a guitar in a park (see Appendix) or for sleeping in a men's room (cf. Jean Valjean in Victor Hugo's Les Miserables), for the information reads as follows:

"Eddie J. Hicks late of the District of Columbia aforesaid, on or about the 19th day of May in the year A. D. nineteen hundred and sixty three, in the District of Columbia aforesaid, and on Dupont Circle north, west, was then and there, and has been since that day and still is a vagrant, to wit; a person leading an immoral and profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation and source and who wanders abroad and lodges in a public park and public comfort stations, living upon the charity of others, and who lives idly and without any settled home, and otherwise leading a profligate life."

APPENDIX.

GUITARIST CONVICTION STIRS PROTEST

By STERLING SEAGRAVE

The Washington Post

June 14, 1963

Eddie Hicks, the 25-year-old Dupont Circle troubadour convicted of vagrancy because he spent his afternoons playing a guitar in Dupont Circle, was given a suspended sentence yesterday.

The American Civil Liberties Union announced it would appeal the Hicks case and attack the constitutionality of his conviction under the vagrancy statute. The ACLU said the statute was unclear and was being used by police to persecute Hicks and others who were only enjoying themselves innocently in a public park.

The young troubadour was arrested by a Park Policeman Wednesday after being warned not to play his guitar in Dupont Circle. As a result, residents of the area and "regulars" in the park are protesting what they consider an invasion of their right to assemble in peaceful recreation.

Top officials of the Interior Department spoke out in favor of guitar playing and folk singing as a "wholesome activity that should not be disturbed but encouraged" in the Nation's public parks.

At the trial Wednesday, Park Policeman James E. Thomas told Judge Thomas C. Scalley that Hicks was unemployed. Hicks testified that he was only visiting Washington for a few weeks and that he had shown Thomas a $20 bill when the policeman had threatened to arrest him for vagrancy if he ever came back to Dupont Circle.

When he was arrested Wednesday, Hicks was sitting on a bench with a friend, his guitar in a case and money in his pocket, testimony showed.

At the sentencing yesterday, Judge Scalley told the minstrel he was suspending sentence and that Hicks was free on "personal bond." The conviction went down on his record, however.

Reaction came swiftly. At Dupont Circle, angry sympathizers plotted a demonstration.

"If they are going to stick that boy with a vagrancy conviction just for playing a guitar, they're going to have to arrest several hundred of us. We've been playing guitars there for years," said one.

The regular habitues of Dupont Circle on any given day are neighborhood residents, retired folk, families who pause on a stroll in the summer sun, children who play porpoise in the fountain, couples who doze on the grass, and students.

The students were priced out of Georgetown, moved to Foggy Bottom, then relocated to the Dupont Circle area when urban renewal closed Foggy Bottom to them.

They live for blocks around the Circle in low-rent rooming houses, studios and shared apartments. Most are poor, some are out of school temporarily to work evenings and part-time wherever they can find jobs.

Generally, they are clean-cut, neatly dressed in sports clothes, articulate, quiet and yet quick to take offense when they think civil authorities are breathing too closely on their necks.

When they can, they play chess in the Circle, around the fountain, argue age-old questions, or gather around the talented and untalented guitarists among them for spontaneous folk music sessions that quickly draw the interest and amusement of passers-by.

On recent Sundays, spontaneous "hootenannys" have started out of nothing, drawing small crowds which sat listening on the grass.

On May 19, Park Policemen routed the last hootenanny, sending everyone scurrying for cover. Attorney Arthur Neuman was passing by and snapped pictures.

"It was a peaceful, lawful assembly," Neuman said yesterday. "There was no disturbance and it was commendable and refreshing to see young people engaged in good social behavior rather than roaming the streets committing crimes."

Capt. Raymond S. Pyles, chief of the Third Precinct which includes the Circle, reported, "I cannot recall a single complaint about them."

Walter Pozen, assistant to Secretary of the Interior Stewart Udall, said, "Not only do I think they shouldn't be singled out—they should be encouraged. The parks are there for recreation and general use."

"There's no rule I know against playing in a park," said Conrad Wirth, director of the National Park Service. "I like music myself."

Charles Wolfram, the ACLU attorney who will champion Hicks when the case is appealed, said yesterday that his attack would be against three sections of the vagrancy statute.

The statute describes a vagrant as "immoral, profligate and dissolute (with) no lawful means of employment or support, without any settled home."

"First," Wolfram said, "the word 'dissolute' is so vague you can't tell what it forbids. Second, the statute discriminates against the poor and the unemployed. Third, it is used by police as carte blanche to harass anyone they personally dislike."

Looking back at the whole episode, attorney Neuman said, "If a man chooses to spend his life playing a guitar, who has the right to insist that he engage in some sort of servitude?"